Subramaniam a/l Gopal v Public Prosecutor

HIGH COURT (TEMERLOH) — CRIMINAL REVISION NO 43–2 OF 2009
AKHTAR TAHIR JC
24 NOVEMBER 2009

Constitutional Law — Public Prosecutor — Commencement and conduct of prosecution — Commencement of prosecution by local authority against operator of grocery store without license — Whether ultra vires art 145(3) of the Federal Constitution — Whether conduct of prosecution contravened s 377 of the Criminal Procedure Code

Criminal Procedure — Prosecution — Commencement and conduct of prosecution — Prosecution instituted by local authority against operator of grocery store without license — Whether ultra vires art 145(3) of the Federal Constitution — Whether conduct of prosecution contravened s 377 of the Criminal Procedure Code

Local Government — Enforcement — Powers to prosecute — Prosecution instituted by local authority against operator of grocery store without license — Whether ultra vires art 145(3) of the Federal Constitution — Whether conduct of prosecution contravened s 377 of the Criminal Procedure Code — Whether s 120 of the Local Government Act 1976 ultra vires art 145(3)

The accused was charged in the magistrate's court under s 2 of the Local Government Act 1976 ('Act') for, inter alia, operating a grocery store and mini market without license. The accused raised an objection that the institution of prosecution by Majlis Perbandaran Temerloh ('MPT') disregarded the powers of the attorney general to institute prosecution conferred by the Federal Constitution. Learned counsel for the accused contended that the provision of s 120 of the Act is ultra vires the provisions of art 145(3) of the Federal Constitution ('Constitution') which gives the sole and absolute power of the attorney general to institute prosecution. The accused applied to the High Court by way of revision seeking to reverse the learned magistrate's ruling on the preliminary objection.

Held, discharging the accused not amounting to an acquittal:

(1) Throughout the proceedings in the lower court the prosecution was conducted by the prosecuting officer from the MPT purportedly on

behalf of the public prosecutor although no such authorisation in writing from the public prosecutor was shown or tendered in court. This clearly contravened s 377 of the Criminal Procedure Code (see para 3).

(2) Unlike the delegation of powers to conduct prosecution which for purposes of expediency has been allowed and that too with the express authorisation, delegation of institution of prosecution should not be allowed (see para 12).

(3) It is clear from the reading of s 120 of the Act that a parallel power is given to the local authority to institute prosecution and this clearly contravenes art 145(3) of the Constitution and therefore making the provision null and void (see para 20).

(4) The absence of any authorisation in writing by the public prosecutor consenting to the prosecution being initiated and compounded by the fact that the prosecuting officer did not have any written authorisation to prosecute indicated that the public prosecutor was neither aware nor consented to the prosecution (see para 21).

[Bahasa Malaysia summary

Tertuduh telah dituduh di mahkamah majistret di bawah s 2 Akta Kerajaan Tempatan 1976 ('Akta) untuk, antara lain, menjalankan perniagaan kedai runcit dan pasar mini tanpa lesen. Tertuduh membuat satu bantahan bahawa pendakwaan oleh Majlis Perbandaran Temerloh ('MPT') mengabaikan kuasa-kuasa peguam negara untuk memulakan pendakwaan seperti yang diperuntukkan oleh Perlembagaan Persekutuan. Peguam tertuduh yang bijaksana menyatakan peruntukan s 120 Akta adalah ultra vires peruntukan-peruntukan perkara 145(3) Perlembagaan Persekutuan ('Perlembagaan') yang memperuntukkan kuasa tunggal dan mutlak peguam negara untuk memulakan pendakwaan. Tertuduh memohon kepada Mahkamah Tinggi dengan cara semakan untuk mengakaskan keputusan majistret yang bijaksana terhadap bantahan awalan tersebut.

Diputuskan, tertuduh dilepaskan tanpa dibebaskan:

(1) Sepanjang prosiding di mahkamah rendah pendakwaan telah dikendalikan oleh pegawai pendakwa daripada MPT yang dikatakan bagi pihak pendakwa raya walaupun tiada sebarang pemberian kuasa secara bertulis daripada pendakwa raya yang ditunjukkan atau diberikan kepada mahkamah. Ini dengan jelas melanggar s 377 Kanun Prosedur Jenayah (lihat perenggan 3).

(2) Berbeza daripada perwakilan kuasa-kuasa untuk menjalankan pendakwaan yang mana ianya adalah bagi tujuan suai-manfaat telah

dibenarkan, malah dengan pemberian kuasa secara nyata, perwakilan untuk memulakan pendakwaan tidak patut dibenarkan (lihat perenggan 12).

(3) Adalah jelas daripada s 120 Akta bahawa satu kuasa selari diberikan kepada pihak berkuasa tempatan untuk memulakan pendakwaan dan ini dengan jelas melanggar perkara 145(3) Perlembagaan dan oleh itu peruntukan tersebut terbatal dan tak sah (lihat perenggan 20).

(4) Ketiadaan sebarang pemberian kuasa secara bertulis oleh pendakwa raya yang mengizinkan pendakwaan dimulakan dan fakta bahawa pegawai pendakwa tidak mempunyai sebarang pemberian kuasa secara bertulis untuk mendakwa menunjukkan bahawa pendakwa raya tidak maklum ataupun bersetuju terhadap pendakwaan tersebut (lihat perenggan 21).]

Notes

For a case on public prosecutor generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2273.

For cases on prosecution generally, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2913–3001.

Cases referred to

Long bin Samat & Ors v PP [1974] 2 MLJ 152, FC (refd)
Nguang Chan Sdn Bhd v PP [2001] 2 MLJ 129, CA (refd)
Pai San & Ors v PP [2002] 4 MLJ 538, CA (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50, PC (refd)

Legislation referred to

Criminal Procedure Code s 377
Environmental Quality Act 1974
Federal Constitution art 145(3)
Local Government Act 1976 s 120
Street, Drainage and Building Act 1974 s 123

M Ramachandran (Rama-Rozi & Associates) for the applicant.
Mohd Najmi bin Daud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Akhtar Tahir JC:

[1] This case was brought to the High Court by way of revision seeking to reverse the learned magistrate's ruling on a preliminary objection raised by learned defence counsel for the accused.

[2] From the records of the Magistrate's Court Temerloh the accused was first charged in the court on 31 January 2008 and the charges against the accused were as follows:

PERTUDUHAN:

(SAMAN NO: 86-416 TAHUN 2006)

Bahawa kamu pada 18/4/2006 jam 10.00 pagi di No. 10A, Jalan Besar, Lanchang dalam Negeri Pahang telah didapati kamu telah menjalankan perniagaan kedai runcit tanpa lesen.

Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 2, Akta Kerajaan Tempatan, 1976 (Undang-Undang Kecil Tred Perniagaan dan Perindustrian) Majlis Daerah Temerloh, 1984 dan boleh dihukum di bawah seksyen 26 Akta yang sama.

(SAMAN NO: 86-417 TAHUN 2006)

Bahawa kamu pada 06/6/2006 jam 10.26 pagi di No. 10A, Jalan Besar, Lanchang dalam Negeri Pahang telah didapati kamu telah menjalankan perniagaan mini market tanpa lesen.

Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 2, Akta Kerajaan Tempatan, 1976 (Undang-Undang Kecil Tred Perniagaan dan Perindustrian) Majlis Daerah Temerloh, 1984 dan boleh dihukum di bawah seksyen 26 Akta yang sama.

(SAMAN NO: 86-418 TAHUN 2006)

Bahawa kamu pada 10/3/2006 jam 5.30 petang di No. 10A, Jalan Besar, Lanchang dalam Negeri Pahang telah didapati kamu telah menjalankan perniagaan runcit tanpa lesen.

Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 2, Akta Kerajaan Tempatan, 1976 (Undang-Undang Kecil Tred Perniagaan dan Perindustrian) Majlis Daerah Temerloh, 1984 dan boleh dihukum di bawah seksyen 26 Akta yang sama.

(SAMAN NO: 86-419 TAHUN 2006)

Bahawa kamu pada 10/3/2006 jam 5.10 petang di No. 10A, Jalan Besar, Lanchang dalam Negeri Pahang telah di dapati kamu telah menjalankan perniagaan barangan runcit tanpa lesen.

Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 2, Akta Kerajaan Tempatan, 1976 (Undang-Undang Kecil Tred Perniagaan dan Perindustrian) Majlis Daerah Temerloh, 1984 dan boleh dihukum di bawah seksyen 26 Akta yang sama.

[3] It is also clear from the records that throughout the proceedings in the lower court the prosecution was conducted by the prosecuting officer from the Majlis Perbandaran Temerloh purportedly on behalf of the public

prosecutor although no such authorisation in writing from the public prosecutor was shown or tendered in court. This clearly contravenes s 377 of the Criminal Procedure Code.

[4] However this is not the crux of the objection of learned defence counsel. Issues on the conduct of prosecution in the court has been settled by the relevant amendments to the provisions of the Criminal Procedure Code.

[5] The crux of the objection in this case is the institution of prosecution by the Majlis Perbandaran Temerloh and thereby disregarding the powers of the attorney general to institute prosecution conferred by the Federal Constitution.

[6] The difference between an institution of prosecution and a conduct of prosecution has been highlighted in at least two cases. The first case being *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 where Abdoolcader J (as His Lordship then was) stated as follows:

> 'Institute' in art 145(3) cannot cover the subject-matter of s 418A of the Code, as the solicitor general contends. It must necessarily refer to the commencement of criminal proceedings and prosecutions and not to such as have already been instituted and are pending or to criminal procedure as such. It may well be, as the solicitor general submits, that the public prosecutor has power, apart from the application of the provisions of ss 417 and 418A of the Code to direct any case triable in the magistrate's or sessions court to be tried in the High Court after a preliminary inquiry. This power to so direct would, if exercised, fall squarely within his discretion to institute and conduct criminal prosecutions and proceedings. The position under s 418A of the Code is wholly different as it has no relation to the institution and for that matter the conduct of criminal proceedings but instead clearly and expressly concerns and relates to criminal cases already commenced and pending in the subordinate courts.
>
> 'Conduct' in art 145(3) cannot but refer to the conduct of prosecutions in court, as it indeed appears ipsissimis verbis in s 377 of the Code.

[7] The rationale as to why the institution of prosecution is the sole prerogative of the attorney general was stated in the case of *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 by Lord Diplock as follows:

> Under the common law system of administration of criminal justice a prosecuting authority has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused. Such a discretion is conferred upon the attorney general of Malaysia by art 145(3) of the Constitution, viz:
>
> > The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial.

There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the Ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another.

[8] Coming to the matter at hand learned counsel contends that the provision of s 120 of the Local Government Act 1976 is ultra vires the provisions of art 145(3) of the Federal Constitution which gives the sole and absolute power of the attorney general to institute prosecution.

[9] For ease of reference the provisions of s 120 of the Local Government Act 1976 is stated here and worded as follows:

> (1) The local authority may direct any prosecution for any offence under this Act or any by-law, rule or regulation.

[10] Whereas art 145(3) of the Federal Constitution reads as follows:

> (2) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court martial.

[11] The first point that comes to mind is whether the power to institute prosecution can or should be allowed to be delegated keeping in mind what was stated by Lord Diplock that to institute prosecution involves a thought process which should be exercised only by persons deemed fit to exercise such a process. The supreme law of the land has thought it fit that such exercise be carried out only by the attorney general and by extension perhaps his officers who form the attorney general's chambers.

[12] Unlike the delegation of powers to conduct prosecution which for purposes of expediency has been allowed and that too with the express authorisation and by virtue of the amendment of the law, delegation of institution of prosecution should not in my mind be allowed. The same sentiments are shared in the decisions in a number of cases.

[13] In the case of *Nguang Chan Sdn Bhd v Public Prosecutor* [2001] 2 MLJ 129 Lamin PCA stated as follows at p 141:

That is all that is required to be said about the proceedings. However by lodging a complaint as was done by the assistant controller, did not help to salvage the case in any way. By so doing it could be said that he did institute proceedings. However whatever action he took would still be under the supervision of the controller (s 26(2)(j) of the Act which would be 'subject to the general direction and control of the Minister' and therefore in direct conflict with art 145(3) of the Constitution and to that extent the said provision would be struck down as null and void (art 4(1) of the Constitution).

[14] In the case of *Pai San & Ors v Public Prosecutor* [2002] 4 MLJ 538 at p 547 Abdul Hamid Mohamad JCA (as His Lordship then was) stated as follows:

In our view, the judgments of the courts have been quite consistent. A provision giving the power to institute, conduct or discontinue a proceeding for an offence is unconstitutional and void if it is exercisable independently of, or if it is parallel to the powers vested in the public prosecutor by art 145(3) of the Federal Constitution. Any authorisation given pursuant to such (void) provision is void and the prosecution instituted and conducted by a person so authorised is void. However, so long as the power given to another person is subject to the powers of the public prosecutor under art 145(3) of the Federal Constitution, it is valid.

[15] In the case of *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 at p 158 Suffian LP stated as follows:

On independence the Federal Constitution came into force, and cl (3) of its art 145 (as amended) provided:

> The Attorney-General shall have power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial.

In our view, this clause from the supreme law clearly gives the attorney general very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pp 32–33 in *Smedleys Ltd v Breed*). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.

Anyone who is dissatisfied with the attorney general's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

[16] The Parliament itself has thought it fit to amend the laws to bring it in line with art 145(3) of the Federal Constitution. One such law is the Street, Drainage and Building Act 1974 which coincidentally also falls under the purview of the Town Council. Section 123 of the Street, Drainage and Building Act 1974 after amendment now read as follows:

> No prosecution for an offence under this Act or any by law made there under shall be instituted except by or with the written consent of the Public Prosecutor.

[17] Another Act, the Environmental Quality Act 1974 the provision relating to prosecution after amendment read as follows:

> No prosecution shall be instituted for an offence under this Act or regulations made there under without the consent in writing of the Public Prosecutor.

[18] There are views that if the intention of the Federal Constitution was to give sole discretion to the attorney general it would be have been expressly stated by using words 'sole' or 'only'. To my mind this views are untenable because the Constitution does provide exceptions to the powers of the attorney general, the exceptions being the Syariah Courts, Native Courts and Court Martial. If the drafters of the Constitutions had other exceptions in mind they would have expressly stated that as well.

[19] On arguments that if all offences however minor or petty were to be referred to the attorney general, the attorney general would be deluged with all sort of cases and he would not be able to cope. My view is that the principles of criminal justice should not and cannot be sacrificed for the sake of expediency. Any offence however minor is capable of taking away the liberties and rights of a person and must be viewed seriously.

[20] It is clear from the reading of s 120 of the Local Government Act as it stands now, a parallel power is given to the local authority to institute prosecution and this clearly contravenes art 145(3) of the Federal Constitution and therefore making the provision null and void.

[21] In this case the absence of any authorisation in writing by the public prosecutor consenting to the prosecution being initiated and compounded by the fact that the prosecuting officer did not have any written authorisation to prosecute indicates to me that the public prosecutor was neither aware nor consented to the prosecution in this case. I therefore discharge the accused not amounting to acquittal of all the charges against him.
Accused discharged not amounting to an acquittal.

Reported by Kanesh Sundrum